Filed 9/22/06 Roshan v. Engstrom, Lipscomb & Lack CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KAVEH ROSHAN, Plaintiff and Appellant, v. ENGSTROM, LIPSCOMB & LACK et al., Defendants and Respondents.	B183953 (Los Angeles County Super. Ct. No. BC270545)

APPEAL from the judgment of the Superior Court of Los Angeles County. James R. Dunn, Judge. Affirmed.

Kaveh Roshan, in pro. per., for Plaintiff and Appellant.

Engstrom, Lipscomb & Lack and Rahul Ravipudi for Defendants and Respondents.

* * * * * * * * * *

This is the third time that appellant Kaveh Roshan's pursuit of his former lawyers, the firm of Engstrom, Lipscomb & Lack, respondent herein, is before us.

In our nonpublished opinion *Roshan v. Engstrom, Lipscomb & Lack et al*. (Aug. 5, 2004, B166449) (hereafter *Roshan I*), the sole plaintiff was Kaveh Roshan, individually, and respondent and two lawyers in the respondent law firm were the defendants. In *Roshan I* we affirmed summary judgment in favor of respondent on appellant's, i.e., Kaveh Roshan's, breach of contract claim. As to the causes of action for fraud, intentional infliction of emotional distress and defamation, we affirmed the trial court's order sustaining respondent's demurrers to the first amended complaint without leave to amend. We reversed the trial court's order that sustained respondent's demurrer to a cause of action for negligence, i.e., professional malpractice. (As we discuss more fully *post*, the alleged malpractice on the part of respondent occurred in an action brought by Roshan International, Inc., against its insurer, Hartford Insurance Company.) The trial court had ruled that the cause of action for malpractice was barred by the statute of limitations because, in the trial court's opinion, the allegations of the first amended complaint did *not* relate back to the original complaint. We concluded to the contrary, i.e., that the allegations of the first amended complaint *did* relate back to the original complaint, and therefore reversed the trial court's ruling on this cause of action.

In our nonpublished opinion *Roshan International, Inc. v. Engstrom, Lipscomb & Lack et al*. (May 23, 2005, B175606) (*Roshan II*), we affirmed the trial's court's order sustaining respondent's demurrer without leave to amend as to the entirety of the action. The action in *Roshan II* was identical to the action that was before us in *Roshan I*, with the exception that the sole plaintiff in *Roshan II* was Roshan International, Inc. We found that Roshan International, Inc., was in privity with Kaveh Roshan and for that reason *Roshan II* was barred by res judicata, i.e., the judgment in *Roshan I*. With respect to the cause of action for legal malpractice, we concluded that, as far as *Roshan II* was concerned, this

cause of action was barred by the statute of limitations.[1] We closed our opinion in *Roshan II* by noting, quoting from Witkin, that *Roshan II* "is 'multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*.' (7 Witkin, Cal.Procedure, *supra*, Judgment, § 280, p. 820.)" (*Roshan II*, *supra*, B175606.)

This appeal, *Roshan III*, pursued by Kaveh Roshan in pro. per., addresses the cause of action for legal malpractice in *Roshan I* that we remanded to the trial court. After our remand, respondent moved for summary judgment on the ground, among others, that the insured under the Hartford policy was Roshan International, and not Kaveh Roshan. Respondent contended that since the insured was Roshan International, Kaveh Roshan could not claim damages in the action against Hartford. Respondent reasoned that therefore Kaveh Roshan individually could not have sustained damages as a result of respondent's alleged malpractice in prosecuting the action against Hartford. (*Roshan I* is brought only by Kaveh Roshan; Roshan International was not and is not a party to *Roshan I*.) The trial court agreed with respondent and granted respondent's motion for summary judgment on January 19, 2005, after our decision in *Roshan I*, and before our decision in *Roshan II*.

FACTS

The cause of action for legal malpractice is predicated on respondent's performance of legal services for Roshan International, commencing in August 1999, when, as we noted in *Roshan II*, Kaveh Roshan, as CEO of Roshan International, retained respondent to represent Roshan International in an action against Hartford. The action against Hartford was based on a claim that arose from a robbery of Roshan International's place of business in December 1994.

Roshan International submitted a claim for $300,000 to Hartford, which initially paid $58,102.[2] After Roshan International submitted a further claim of $1.9 million for business

---

[1] *Roshan II* was filed more than two years after the last possible date that the cause of action for legal malpractice could accrue.

[2] Cents are omitted throughout the opinion.

interruption, Hartford paid an additional $30,174. Under the terms of the policy, the matter was required to be submitted to an appraisal proceeding.

The claim for legal malpractice arises in part from respondent's performance of services in the appraisal proceeding, which resulted in an award of $55,000. The claim for legal malpractice is predicated on three acts of omission/commission. First, it is alleged that respondent did not inform Kaveh Roshan that the appraisal ruling could be appealed, and respondent did nothing to appeal the ruling. Second, it is claimed that respondent erroneously dismissed defendant Newcomb & Dalton with prejudice from the bad faith action against Hartford. Third, the claim is that respondent did not initiate timely discovery of important documents in the action against Hartford. Appellant claims that these errors resulted in the award of $55,000 and that the award "should have been for over $129,400."

The controversy between Hartford, on the one hand, and Roshan International, on the other, continued unabated after the appraisal award of $55,000. Hartford made a claim for $33,276, which was the difference between what it paid ($88,276) and the appraisal award, and Roshan International proceeded to sue Hartford for the bad faith breach of its insurance contract.

According to respondent, during the appraisal proceedings facts and circumstances came to light that indicated that Kaveh Roshan had submitted allegedly fraudulent claims to Hartford. Respondent claims that this "destroyed Plaintiff's [Kaveh Roshan's] credibility" and led to what respondent concedes is an "unfavorable" appraisal award, since it was less than what Hartford had already paid. Respondent states that Kaveh Roshan's misconduct caused it to withdraw from the case, which occurred on March 22, 2001. (The appraisal award was handed down in September 2000.)

Two more events occurred that are germane to a substantive discussion of this appeal.

First, at some point after respondent withdrew from the case, Roshan International settled the bad faith action against Hartford for a payment by Hartford of $200,000.

Second, Hartford moved to confirm the appraisal award, and on July 5, 2002, the superior court, per Judge Lawrence W. Crispo, affirmed the award. In confirming the

award, the court found that there was nothing to indicate that the award was obtained by "corruption, fraud and undue influence despite Plaintiff's assertion to the contrary" nor was there anything to show that the award was "rendered under mistaken facts, improper arguments or unguided suppositions." The court also found that the "Plaintiff," meaning Roshan International, had not filed a timely petition to set aside the appraisal award. As far as the claim was concerned that the "improprieties" were not discovered until the award was entered, the court found that Roshan International did not indicate why these matters were not discovered before, or why Roshan International did not petition when these matters were discovered. In substance, the court found that Roshan International's claims about the alleged defects or flaws in the appraisal award were time-barred.

DISCUSSION

1. Roshan International, and Not Kaveh Roshan Individually, Was Allegedly Damaged in the Course of Litigation with Hartford

The insured under the Hartford policy was Roshan International, dba Duplitext Printing #3. It follows that the appraisal proceedings, as well as the bad faith action, involved only Roshan International and Hartford, and did not involve Kaveh Roshan individually.

This is not a technicality. At one point after the appraisal proceedings, Hartford asserted a claim of $33,276. That claim was against Roshan International; Hartford could not assert that claim against Kaveh Roshan, unless Hartford was able to prove that Roshan International was the alter ego of Kaveh Roshan. That has not happened. In fact, Kaveh Roshan's assertion in *Roshan II* was to the contrary, i.e., *Roshan II* was based on the explicit premise that Roshan International is an entity separate from Kaveh Roshan.

That Roshan International was in privity with Kaveh Roshan, as we found in *Roshan II*, does not mean that Roshan International is the alter ego of Kaveh Roshan. The fact that

parties have mutual interests does not mean that one party is the alter ego of another party. The alter ego doctrine rests on considerations distinct from the concept of privity.[3]

Assuming, as one must in light of the $200,000 settlement, that Roshan International had at least an arguable claim against Hartford, any diminution in the value of that claim was necessarily a diminution of *Roshan International's* claim. In other words, if respondent's negligence adversely affected that claim, the party that sustained that loss was Roshan International and not Kaveh Roshan.

Respondent advanced as an undisputed material fact that Kaveh Roshan, individually, was not a beneficiary under the Hartford policy. Appellant disputed this fact by claiming that the insured under the Hartford policy was "Roshan International Inc., dba Duplitext #3." In his declaration, appellant states that his printing business is done by a "closely held corporation doing business as Duplitext #3 Printing & Graphics, Inc." In the hearing on the motion for summary judgment, appellant explained that he is the sole proprietor of Duplitext #3, and that he filed a fictitious name certificate for Duplitext #3. As appellant puts it in his opening brief, "it was obvious that Appellant was a single person operating with a fictitious name of Duplitext No. 3 and also as Roshan International, a corporation."

The Hartford policy refers to the "named insured" twice as "ROSHAN INTERNATIONAL DBA: DUPLITEXT PRINTING #3" and once as "DUPLITEXT PRINTING #3." In view of appellant's claims advanced during the oral argument of this matter that he was individually named as an insured under the policy, we gave leave to advise us by letter where in the appellate record it is reflected that appellant is named individually as an insured in the Hartford policy. Appellant has submitted a letter referring to an endorsement that gives, as the "NAME AND MAILING ADDRESS OF THE

---

[3] "When a corporation is used by an individual or individuals, or by another corporation, to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may *disregard the corporate entity* and treat the acts as if they were done by the individuals or by the controlling corporation." (9 Witkin, Summary of Cal. Law (10th ed. 2005) Corporations, § 9, p. 785.)

INSURED," "DUPLITEXT PRT #3 [¶] ROSHAN INTL. INC." on Washington Boulevard in Culver City. It appears that the endorsement relied upon by appellant recites precisely what the policy states, i.e., that Kaveh Roshan is not named individually as an insured.

Appellant's insistence in the trial court, as well as on appeal, that there is a fictitious business name certificate on file in Culver City that states that Duplitext Printing #3 is a fictitious name for appellant and that, in view of this, he is a named insured, is mistaken. It is the policy, and not a document entirely extraneous to the policy that was generated at a different time and for a different purpose, that determines who the named insured is. Appellant's theory would allow someone to impose on the insurance carrier a person as insured under the policy by the simple expedient of unilaterally filing a fictitious business name certificate -- when the carrier had no intention of insuring such a person. It is obvious that such a result would be entirely unsupportable in law, logic or policy.

While we have no information about Duplitext #3 other than appellant's assertion that it is a fictitious business name, the record contains copies of documents filed with the California Secretary of State that shows that Roshan International is a California corporation, and that Kaveh Roshan is the chief executive officer, secretary, chief financial officer and sole director of this corporation.

Even though Kaveh Roshan is a central figure in this long-drawn-out controversy, the fact remains that he is not a named insured under the Hartford policy. It is Roshan International that is the insured (whether or not it is doing business as Duplitext #3) and it is therefore Roshan International, and not Kaveh Roshan, that had a cause of action for a breach of the contract of insurance. It is settled that where the corporation claims an injury and files an action for damages to compensate for that injury, the action must be brought by the corporation and not, by way of an example, by a shareholder or shareholders, even if the shareholder attempting to bring the action is the sole shareholder, the situation that effectively obtains in this case. (*San Diego Gas Co. v. Frame* (1902) 137 Cal. 441, 447; *Vinci v. Waste Management, Inc.* (1995) 36 Cal.App.4th 1811, 1815.) As noted by the court in *Vinci v. Waste Management, Inc.*, allowing the individual (whether shareholder, director or other officer) to sue for damages that the corporation had sustained opens the door to the

possibility of a double recovery -- one by the individual, and the other by the corporation. (*Vinci v. Waste Mangement, Inc*., at p. 1815.)

Appellant points to the fact that the retainer agreement with respondent was signed by Kaveh Roshan as CEO of Roshan International, and that it was also signed by Kaveh Roshan in his individual capacity, and that both Roshan International and Kaveh Roshan are designated as "clients" in the retainer agreement. This argument misses the mark; the point is that Kaveh Roshan as an individual had no cause of action against Hartford, whether or not he was designated a client of respondent's in the retainer agreement.

Appellant's argument that he had a "beneficial interest" in any damages to, or recovery of damages by, Roshan International, and that this "beneficial interest" gives him standing to sue, is also without merit. Appellant has taken the concept of a "beneficial interest" from Code of Civil Procedure section 1086, which provides that a writ of mandamus must be issued upon the verified petition "of the party beneficially interested." Appellant's first amended complaint is not a petition for a writ of mandate; there is no general rule that allows anyone with a "beneficial interest" to bring a civil action when such a party does not otherwise have standing to sue.

Finally, the considerations underlying judicial estoppel confirm our conclusion that Kaveh Roshan and Roshan International must be treated as separate entities in this case. The necessary predicate for *Roshan II* was that Roshan International was a distinct entity from Kaveh Roshan, who is the plaintiff in *Roshan I*. " 'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.' [Citation.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) Appellant cannot maintain in this appeal, i.e., in *Roshan III*, a position[4] that is diametrically opposed to the theory underlying *Roshan II*. Roshan

---

[4] As appellant put it in his opening brief: "[I]t was obvious that Appellant was a single person operating with a fictitious name of Duplitext No. 3 and also as Roshan International, a corporation."

International is a distinct entity; appellant has no standing to bring an action to recover damages allegedly sustained by Roshan International.

2. Roshan International Has Been Compensated for Its Losses

Although in strict theory it is not necessary to address the question whether Roshan International has been compensated for its losses, in the interests of justice we note that, under appellant's view of the case, the appraisal award should have been "over $129,400," instead of $55,000. This means that, according to appellant, Roshan International sustained a loss of approximately $75,000.

Hartford paid $200,000 to Roshan International in settlement. In the event that Hartford did not recover the two payments totaling $88,276 that it made under the policy, Roshan International recovered from Hartford $288,276, or nearly four times its loss. In the unlikely event that $88,276 or portion thereof was credited against the settlement of $200,000,[5] Roshan International recovered at least $36,724 more than its actual loss -- assuming that appellant's statement of a loss of $129,400 is accurate and credible.

Roshan International has been compensated for its losses. It is time to put an end to this matter.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs in this appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P. J. BOLAND, J.

---

[5] Hartford's obligation to pay at least $55,000 arose under the policy; the sum of $200,000 was paid to settle the bad faith claim.